IN THE

Supreme Court of the United States

October Term, 2008

COMMANDER GEORGE C. CHAPPELL, et al.,

Petitioners,

v.

WILLIE WALLACE, et al.,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BILL OF RIGHTS FOUNDATION, INC.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-167

COMMANDER GEORGE C. CHAPPELL, et al.,

Petitioners,

v.

VERNON WALLACE, et al.,

Respondents.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE
of
THE BILL OF RIGHTS FOUNDATION, INC.

INTEREST OF AMICUS

The Bill of Rights Foundation, Inc. is an organization concerned exclusively

with the protection of constitutional rights.* It has done this work for more than a decade by supporting litigation in that area either directly or by filing briefs amicus curiae. The Foundation believes that the instant case presents such issues.

THE NATURE OF THE CASE

This case rests on one of the three constitutional protections essential to a free society: freedom of speech, due process and equal protection. The complaint, by six black enlisted men on a

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* Written consents to the filing of this brief amicus curiae have been granted by all parties and have been lodged with the Court.

naval vessel, alleges various acts claimed to have been motivated by racial discrimination and seeks damages from the individuals responsible. The claims were assignments to the least desirable occupations, exclusions from training programs, giving low evaluations and unusually severe punishment. In one instance one of the men complained that he had been subjected to the indignity of being ordered to clean a stove with a toothbrush.

The Court of Appeals in Wallace v. Chappell, 661 F.2d 729 (1981), held the complaint sufficient subject to the consideration by the District Court of the following four criteria: (1) the nature and strength of the plaintiff's claim; (2) the potential injury to the plaintiff if review is refused; (3) the extent of

interference with military functions; (4) the extent to which military discretion or expertise is involved. Petitioners have brought the case to this Court without waiting for action by the District Court in conformity with these criteria.

It will be noted that the Court of Appeals has not held that a serviceman may sue his superior for alleged violation of a constitutional right regardless of applicable considerations and that petitioners are asking this Court to rule that such a suit can never be maintained. We submit that there is nothing in the previous decisions by this Court or in the applicable policy considerations that compels so drastic a result.

ARGUMENT

There is no basis for the statement in petitioners' brief (p. 4) that every other Court of Appeals has "refused to allow a serviceman to sue his superior officer for damages for a constitutional violation." Not one of the cases cited (pp. 14, 15) involves a constitutional issue of the magnitude here presented. Indeed, no constitutional issue whatever was raised in most of the cases. All of them sought damages for injuries or death resulting from claimed negligence or malpractice, progeny of this Court's decision in Feres v. United States, 340 U.S. 135 (1950). In those cases in which an attempt was made to translate the tort into a constitutional violation the courts described this as mere verbal maneuvering. The courts

also stressed the fact that Congress has assured servicemen some form of compensation. No such congressional provision exists with regard to the harm claimed here. Indeed, in one of the cited cases the court noted that there might be situations in which the violation of a constitutional right would permit a suit for damages: Calhoun v. United States, 475 F. Supp. 1, 5 (1977). Surely this is such a case. Moreover, in Tigue v. Swaim, 585 F.2d 909 (8th Cir. 1978), the Eighth Circuit, while denying relief in the particular case, held that military officers, at least during peacetime, were not entitled to absolute immunity. 585 F.2d at 914. Summary judgment was therefore held inappropriate insofar as it rested on absolute immunity.

We come then to the merits of the arguments made by petitioners. We pass over their discussion of most of this Court's prior decisions (pp. 15-19) as that discussion and the cases considered really have nothing to do with the issue in this case. The various references in petitioner's brief (pp. 22, 36, 37) to Harlow v. Fitzgerald, now reported at 102 S. Ct. 2727 (1982), miss the real point of the decision. This Court there held that assistants to the President were not entitled to absolute immunity but only to qualified immunity. Justice Powell pointed out that this existed when the conduct of the individual "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 102 S. Ct. at 2738. Where the conduct

does violate such rights an action for damages lies. In the case at bar the violation claimed is of a constitutional right of which defendants must certainly have been aware -- the right to be free from racially motivated discrimination. The case is therefore authority for the position here taken by the Court of Appeals.

1. Petitioners' chief argument is that of disruption of military discipline (pp. 20-26). They have not given real consideration to the fact that the Court of Appeals required the District Court, before allowing the case to proceed, to determine "the extent of interference with military functions." 661 F.2d at 733. The various quotations from decisions of this Court were in contexts wholly different from the pre-

sent one.

The stress on the threat of "massive personal liability" (p. 2) states the real issue: which is more important -- the eradication of racial discrimination or the protection of those responsible? The question answers itself. And since the only way in which the sufferers of the indignity of racial discrimination can be protected is by money damages, a suit such as this should be maintainable. Indeed it may well be that the threat of money damages will help eradicate such discrimination more quickly than anything else. It may even be necessary to accomplish the needed result. In passing, it should be noted that petitioners have been spared the financial burden of defending; that has been assumed by the government.

2. Petitioners next argue (pp. 26-30) that the courts will be "intruding into military affairs." That misstates the issue. This case requires the courts to consider only one basic issue: were the challenged actions motivated by racial discrimination. In that area the courts have great expertise -- from the implementation of Brown v. Board of Education, 347 U.S. 483 (1954) to the interpretation of the Civil Rights Acts of 1957 and 1964 (42 U.S.C. § 1971, et seq.), as well as the Voting Rights Act of 1965, (42 U.S.C. § 1971, 1973, et seq.). Indeed, there is hardly any other subject in the civil law area with which the courts have been more frequently concerned -- as, in the criminal law area it has been the Fourth Amendment.

Petitioners seem to suggest (p. 27, n. 4) that any administrative decision reached here would be final. But Congress has not so decreed. Nor has Congress provided any remedy for compensating the affronted servicemen.

Petitioners (pp. 28, 29) talk about possible interference with military discipline. But the issue here is not whether, in the ordinary sense, the actions taken were proper, but whether they were improperly motivated.

The discussion (p. 30) of the criteria held applicable by the Court of Appeals (which we have quoted above) simply rejects the idea that a civilian court can ever pass on military matters. For so sweeping a statement no authority is cited. And such doctrine would

portend the end of constitutional government.

3. Petitioners next discuss (pp. 31-35) the tensions which might result if suits like the instant one were allowed. But nothing is here added to what they argued elsewhere. The references to remedies provided by Congress ignore the fact that Congress has made no provision to compensate persons like respondents here.

4. Finally, petitioners claim (pp. 35-39) that they should have absolute immunity. But there is nothing in the functions performed by any of these persons to entitle them to the immunity granted judges and prosecutors. The subject was carefully considered in Alvarez v. Wilson, 431 F. Supp. 136, 144

(N.D. Ill. 1977), app. pending, No. 81-2696 (7th Cir.) and also by the court below, 661 F.2d at 735, et seq. It concluded that petitioners were entitled to qualified immunity if they acted in good faith. In a sense there really is no such question here. For if any of petitioners acted, as here charged, to deprive any of respondents of their right to equal treatment because of their race, they could not have acted in good faith.

5. It is pertinent to discuss at some length the Dinsman cases cited by the Court of Appeals, 661 F.2d 732, 735, n. 8; Wilkes v. Dinsman, 48 U.S. (7 How.) 89 (1849); Dinsman v. Wilkes, 53 U.S. (12 How.) 390 (1851). Dinsman, who had enlisted in the Navy, sued his superior, Capt. Wilkes, for damages claiming that

he had been unlawfully treated while his ship was on an expedition in the Sandwich Islands. In the first trial plaintiff recovered. This Court reversed and ordered a new trial because defendant had been required to justify his actions. At the second trial, defendant was successful. Again this Court ordered a new trial because of errors committed. We are not told what happened afterwards.

The records of the cases are hard reading because the contentions of the parties are set forth in full in their ancient form of bills of exceptions. But the holdings are clear, namely, that a commanding officer may be liable to a subordinate for damages if he acts with malice. In the first case Justice Woodbury rejected plaintiff's claim that he was no longer subject to discipline

but ruled that defendant would not be liable if his acts were "not influenced by malice, corruption or cruelty." (p. 129) He further said that no exception should be allowed "under color of his office however elevated or however humble the victim." (p. 130) In the second case Chief Justice Taney said that the nation would be dishonored if it "allowed the humblest individual in its service to be oppressed or injured by his commanding officer from malice or ill-will." (p. 403)

Petitioners attempt to distinguish these cases (p. 39) on two grounds: that the wrong complained of did not arise under the Constitution; and that at the time of the decisions our armed forces were small. The first point is without logical basis since there is no

reason to suppose that a constitutional right has any less validity than a common law one; the second point is shocking -- rights cannot be diminished because they affect large numbers of people.

In sum, these two opinions stand as authority for the position taken by the Court of Appeals and should be followed today by this Court.[1/]

CONCLUSION

So we come back to the opinion of the Court of Appeals -- 661 F.2d 729 -- which carefully considered all the issues. It based jurisdiction on Bivens v. Six Unknown Named Agents, 403 U.S.

1/ The first of these cases was recently cited by this Court in Butz v. Economou, 438 U.S. 478, 492 (1978).

388, n. 1 at p. 370 (1971). The Court considered at length, 661 F.2d at 731-734, the extent to which actions by military officers could be challenged in civil courts and concluded that the criteria formulated in Mindes v. Seaman, 453 F.2d 197 (1971), were applicable. These we have quoted above. The Court then limited their application to what could be considered as "recognized" constitutional right. That the claims here asserted, denial of equal protection, come within that description and cannot be denied.

Finally, the Court of Appeals took up the question of the available remedy -- under the heading of "Immunity", 661 F.2d at 734-737. The Court based its conclusion that this action was maintainable (under the conditions previously

laid down) primarily because no other form of relief could compensate respondents for the indignities they claim to have suffered.

The conclusions of the Court of Appeals should be accepted here and its order affirmed.

Respectfully submitted,

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